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April 1, 2015

By Email (wood.nicole@epa.gov) and U.S. Mail

Ms. Nicole Wood-Chi
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd., C-14J
Chicago, IL 60604-3507

Re: Otsego Township Time-Critical Removal Action

Dear Ms. Wood-Chi:

I am writing in response to Richard Karl's March 19, 2015, letter requesting that NCR Corporation ("NCR") advise you about its interest in negotiating a potential agreement for the performance of a proposed time-critical removal action in the Otsego Township portion of Operable Unit 5 ("Otsego TCRA") of the Allied Paper, Inc. / Portage Creek / Kalamazoo River Superfund Site (the "Site").

NCR respectfully declines to negotiate an agreement for performance of the proposed Otsego TCRA for two principal reasons.

First, NCR's potential liability at the Site is not sufficiently significant to warrant participation as a work party at the Site. As you know, all of the parties to whom Mr. Karl's March 19 letter was addressed, including NCR, are currently involved in litigation brought by Georgia-Pacific seeking to allocate past and future response costs at the Site. Although the Court's Phase I decision, which remains subject to appeal, found that NCR has at least some liability as an arranger at least as of March 1969, NCR intends to demonstrate in Phase II that its potential responsibility at the Site is *de minimis*. In particular, NCR will demonstrate that any liability for response costs is reasonably capable of apportionment, and NCR's apportioned share is very small. NCR will further demonstrate that any equitable share of responsibility it bears for any joint liability should likewise be small. Facts supporting NCR's *de minimis* responsibility include the following:

- NCR never owned or operated any facilities along the Kalamazoo River. NCR discharged no pollutants at the Site. The Kalamazoo-area paper mills, by contrast, discharged tens of thousands of pounds of PCBs and other contaminants, failing to implement adequate waste treatment practices, even when judged by the standards of the time.

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- NCR can be liable with respect to the Site only as an “arranger,” and only during the time period that it is found to have had the requisite intent to be liable as an arranger. Although NCR disagrees with the Court’s Phase I decision and will appeal it, the Court held that NCR had the requisite intent only beginning in March 1969 – covering only two years until April 1971, when the production of carbonless copy paper (“CCP”) ceased using PCBs. Because the vast amount of PCB contamination at the Site occurred during the approximately 15 years prior to 1969, NCR can be deemed responsible for no more than a *de minimis* portion of cleanup costs.
- The Kalamazoo-area mills recycled CCP from sources for which NCR cannot be liable – independent converting facilities, independent coating mills, and post-consumer sources never affiliated with NCR. NCR cannot be responsible for contamination arising from CCP sold by these sources during *any* time period. And while the Court found in its Phase I decision that entities affiliated with NCR sold at least some CCP to the Kalamazoo-area mills – a finding with which NCR disagrees – NCR cannot be liable as an arranger for CCP sold by those entities before NCR acquired them or before NCR had the requisite intent for arranger liability. In any event, there is no evidence establishing that any more than a *de minimis* amount of CCP from these sources was recycled by the Kalamazoo-area mill during *any* time period.

Second, NCR has concerns about whether the proposed Otsego TCRA may appropriately be pursued as a time-critical removal action under the National Contingency Plan. In particular, NCR is concerned that the conditions giving rise to the contemplated action have been known for more than six months, and, for that reason, require the proposed work to proceed as a non-time critical removal action. *See, e.g.*, 40 C.F.R. § 300.415(b)(4).

Although NCR is declining to enter negotiations to perform the proposed Otsego TCRA, NCR remains interested in discussing with the EPA ways it can resolve any liability it may have for the Site, without becoming directly involved in remediation activities that are more appropriately performed by the parties who discharged the pollutants.

Please contact me with any questions.

Sincerely,



John M. Heyde